No. 4859.

IN THE

# United States

# Circuit Court of Appeals,

## FOR THE NINTH CIRCUIT.

Graver Corporation, a corporation,
*Plaintiff in Error,*
*vs.*
Hercules Gasoline Company, a corporation,
*Defendant in Error.*

## PETITION FOR REHEARING.

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Graver Corporation, a corporation,
*Plaintiff in Error,*
*vs.*
Hercules Gasoline Company, a corporation,
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**Petition for a Re-Hearing on the Ground That the United States Circuit Court of Appeals Was Without Jurisdiction to Review the Sufficiency of the Evidence to Sustain the Judgment of the District Court for the Reason That There was Not Filed With the Clerk of the District Court a Written Stipulation, Signed by the Parties, Providing for the Trial of the Case by the Court Without the Intervention of a Jury in Compliance With the Requirements of Sections 649 and 700 of the Revised Statutes.**

*To the Honorable Circuit Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:*

The undersigned, your petitioner, respectfully submits that it has been aggrieved by an opinion of Your Honors rendered herein on October 25, 1926, in respects hereinafter set forth and prays for a re-hearing of said matter.

## FACTS.

The above entitled case came before this court upon a writ of error after a trial before the District Court sitting without a jury. This court, speaking through Judge Neterer, reversed the judgment of the District Court on the sole ground that there was not sufficient competent evidence to support the finding of the District Court that S. Reid Holland was authorized by the Graver Corporation to execute the contract which was the basis of the suit. As pointed out in the reply brief of the plaintiff, only questions of law may be considered upon a writ of error and there can be no inquiry whether there was error in dealing with questions of fact. (Reply Brief p. 67.) Particularly is this true where, as in the case at bar, the parties have not filed with the Clerk of the District Court a written stipulation, signed by them, providing for the trial of the case by the court without the intervention of a jury.

In the case at bar there was no written stipulation signed by the parties filed with the Clerk of the District Court providing for the trial of the case by that court without the intervention of a jury.

This court therefore acted *without jurisdiction* in reviewing the evidence received by the District Court and in reversing the judgment of the District Court on the sole ground that there was not competent evidence to support the judgment.

## AUTHORITIES.

### The Circuit Court of Appeals Is Without Jurisdiction to Review on a Writ of Error the Sufficiency of the Evidence to Support the Judgment in a Case Tried Before the District Court Without a Jury, No Written Stipulation, Signed by the Parties, Waiving a Trial by Jury, Having Been Filed With the Clerk of the District Court as Required by Sections 649 and 700 of the Revised Statutes.

In the case of *Bouldin, et al., v. Alto Mines Co.*, 299 Fed. 301, (*Circuit Court of Appeals, 9th Circuit*), this court, speaking through Judge Rudkin, says at page 302:

> "This is a *writ of error* to review a judgment in an action at law tried by the court without a jury. In such cases the rule is firmly established that the *jurisdiction of this court* to review the rulings of the court below, with minor exceptions not material here, is dependent upon a compliance with the requirements of section 649 of the Revised Statutes (Comp. St., Sec. 1587), namely, the filing with the clerk of a stipulation in writing waiving a jury. *No other waiver will suffice, and in the absence of such a stipulation, we can only look to the process, pleadings, and judgment.* Bond v. Dustin, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835; Road Imp. District v. St. Louis S. W. Ry. Co., 257 U. S. 547, 562, 42 Sup. Ct. 250, 66 L. Ed. 364; Columbus Compress Co. v. United States F. & G. Co., 186 Fed. 487, 108 C. C. A. 465; Ladd & Tilton Bank v. Lewis A. Hicks Co., 218 Fed. 310, 134 C. C. A. 106; Ford v. United States, 260 Fed. 657, 171 C. C. A. 421.
>
> There is no error apparent upon the face of the record, and the judgment of the court below must therefore be affirmed." (Italics ours.)

In the case of *Emerzian v. S. J. Kornblum & William Kornblum,* 3 Fed. (2d) 995 (*Circuit Court of Appeals, 9th Circuit*), Judge Rudkin, speaking for this court, says at page 995:

> "This is a writ of error to review a judgment in an action at law tried by the court without the intervention of a jury. *There was no stipulation in writing waiving a jury filed with the clerk,* as required by section 649 of the Revised Statutes (Comp. St., Sec. 1587). *In the absence of such a stipulation it has been held in an almost endless line of decisions that rulings made in the progress of the trial cannot be reviewed by an appellate court,* unless error appears on the face of the process, pleadings, or judgment. Duncan v. Atchison, T. & S. F. R. Co., 72 F. 808, 19 C. C. A. 202; Erkel v. United States, 169 F. 623, 95 C. C. A. 151; Ladd & Tilton Bank v. Lewis A. Hicks Co., 218 F. 310, 134 C. C. A. 106; Bouldin v. Alto Mines Co. (C. C. A.) 299 F. 301; United States v. McGovern (C. C. A.) 299 F. 302.
>
> The judgment of the court below is therefore affirmed." (Italics ours.)

In the case of *United States v. M'Govern,* 299 Fed. 302 (*Circuit Court of Appeals, 9th Circuit*), Judge Hunt, speaking for this court, says at page 303:

> "Counsel for defendant in error questions the *power* of this court to review the rulings of the District Court, because it does not appear that the parties or their counsel complied with section 649 of the Revised Statutes (Comp. St., section 1587), by filing a stipulation in *writing* waiving a jury. The point is well taken, and upon the authority of our decision in Bouldin *et al.* v. Alto Mines Co., 299 Fed.

301 (decided May 26, 1924), we are confined to an examination of the *process pleadings and judgment.* Commissioners v. St. Louis S. W. R. Co., 257 U. S. 547, 42 Sup. Ct. 250, 66 L. Ed. 364." (Italics ours.)

In the case of *Ladd & Tilton Bank v. Lewis A. Hicks Co.,* 218 Fed. 310 (*Circuit Court of Appeals, 9th Circuit*), this court speaking through Judge Van Fleet says at page 311:

> "A jury was dispensed with *by consent of the parties expressed orally in open court, but no stipulation in writing evidencing the waiver was had or filed;* and the assignments of error are all based upon rulings had at the trial.
>
> In this state of the record the defendant in error makes the point that the errors assigned may not competently be inquired into by this court; and we are of opinion that this objection must prevail, at least as to all but a single assignment to be noticed later. The objection is based upon the limitations which circumscribe these courts in trials of issues of fact in actions at law; the statute requiring that they be tried by a jury (section 648, R. S. (U. S. Comp. St. 1913, Sec. 1584)), unless the jury be waived by a stipulation in writing (section 649 (section 1587)), when the facts may be tried by the court and its rulings reviewed as provided in section 700 (section 1668). These provisions have been construed, so far as the right to review is concerned, *as jurisdictional;* and in the absence of a compliance therewith, except the facts be admitted by the parties in a case stated, no question is open for review on error other than 'those arising upon the *process, pleadings, or judgment.*' Erkel v. United States, 169 Fed. 623, 624, 95 C. C. A. 151, 152. In that case the rule and its reason are thus stated by Judge Gilbert:

'It is well settled that no question of law can be reviewed on error, except those arising upon the process, pleadings, or judgment, 'unless the facts are found by a jury by a general or special verdict, or are admitted by the parties upon a case stated.' Campbell v. Boyreau, 21 How. 223, 16 L. Ed. 96. In that case it was held that the finding of issues of fact by the court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act. The court said: 'And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties.'

As all the leading cases in support of these principles are there cited, further consideration of the question is unnecessary, since it is in no respect left in doubt.

*While those sections of the statute applied originally only to trials in the late Circuit Courts, they were, on the abolishment of those courts, given application to the present District Courts.* Judicial Code, Sec. 291 (Act March 3, 1911, c. 231, 36 Stat. 1167 (U. S. Comp. St. 1913, Sec. 1268).)" (Italics ours.)

In the case of *St. Louis S. W. Ry. Co. v. Com'rs of Road Imp. Dist. No. 2,* 265 Fed. 524, at page 528, the court says:

"The cases cited by plaintiffs' counsel are not in point. The suit being in the federal court at law to recover a sum of money, each party in that court was entitled to a jury, unless waived in the manner provided by the federal law. *A question of jurisdic-*

*tion is therefore presented, which it is our duty to notice, whether assigned as error or not.* Section 649, U. S. R. S. (Comp. St., Sec. 1587), provides how the court below might try the case without the intervention of a jury, namely, 'whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury.' Section 700, U. S. R. S. (Comp. St. Sec. 1668) provides that certain questions can be considered by this court when it has been tried without a jury in accordance with section 649. In the case at bar, neither the parties nor their attorneys of record filed a stipulation in writing with the clerk waiving a jury; but the court of its own motion withdrew the case from the jury, and each party, without objection to such action of the court, presented findings of fact and conclusions of law to the court for its approval. The case, therefore, stands as a civil case at law tried by the court without any waiver of the jury as the law provides. Where this is so, and the facts are not admitted in a case stated, *we have no jurisdiction to review any question on a writ of error, except those which arise on the process, pleadings, or judgment,* and no such question appears." (Italics ours.)

In the case of *James-Dickenson Farm Mortgage Company, et al., v. Seimer,* 12 Fed. (2d) at 772 it is said:

"The cause was tried by the court without a jury, *a jury being waived. No stipulation in writing* waiving a jury was filed with the clerk, as required by section 649 of the Revised Statutes (Comp. St., Sec. 1587). Under section 700 of the Revised Statutes 'the rulings of the court in the progress of the trial' may be reviewed when a stipulation, waiving a jury, has been filed with the clerk as provided in section

649, but not so when the jury is waived orally, as in this case. In such case it is settled law that none of the questions decided at the trial can be re-examined on writ of error. Among the many cases so holding we may note the following: Bond v. Dustin, 112 U. S. 604, 5 S. Ct. 296, 28 L. Ed. 835; Spalding v. Manasse, 131 U. S. 65, 9 S. Ct. 649, 33 L. Ed. 86; County of Madison v. Warren, 106 U. S. 622, 2 S. Ct. 86, 27 L. Ed. 311; Erkel v. United States, 169 F. 623, 95 C. C. A. 151; Ladd & Tilton Bank v. Hicks Co., 218 F. 310, 134 C. C. A. 106; Illinois Surety Co. v. United States, 229 F. 527, 143 C. C. A. 595; United States v. National City Bank (C. C. A.) 281 F. 754." (Italics ours.)

In the case of *United States v. National City Bank of New York,* 281 Fed. 754, at page 758, the court says:

"When a case is tried in a federal court without a jury, and without a *written stipulation waiving* a jury trial, certain important consequences follow. The statutes of the United States provide that the trial of issues of fact in the District Courts, in all causes except in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury. Rev. St., Sec. 566 (Comp. St., Sec. 1583). Then it is provided that issues of fact in civil cases may be tried and determined by the court, without the intervention of a jury, 'whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury', and that the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury. Rev. St., Sec. 649 (Comp. St., Sec. 1587). And it is provided in Rev. St., Sec. 700 (Comp. St., Sec. 1668) that:

'When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.'

It appears from what has already been said that at the opening of the trial in this case, when counsel for the bank stated that he would waive the right to a jury trial, the court at once suggested:

'Then you will have to have a signed stipulation that this may be tried without a jury.'

Counsel for the government did not seem to grasp the significance of the suggestion. At any rate, while he insisted that the matter should be tried without a jury, he claimed no waiver was necessary, and the case went to trial without a jury, and without any written stipulation waiving the jury. The result is that *no question is now open to review in this court on the writ of error,* except it be one arising upon the *process, pleadings or judgment.* This court had occasion to consider the subject in Illinois Surety Co. v. United States, 229 Fed. 527, 143 C. C. A. 595. We declared in that case that, as there had been no written stipulation waiving a jury trial and the case had nevertheless been tried without a jury, it was—

*'Well settled that none of the questions decided at the trial can be re-examined in this court on writ of error. No questions, therefore, are open to review on error, except they arise upon the process, pleadings, or judgment'."* (Italics ours.)

In the case of *Crouch v. United States,* 8 Fed. (2d) 435, at page 436, the court says:

> "A motion on behalf of the United States was then made in this court to dismiss the writ of error on the ground that, inasmuch as the case was tried without a jury, in the absence of the statutory written stipulation waiving a jury trial, the decision below was not a judicial determination, and therefore, not subject to re-examination in the appellate court. *The general rule is now too well settled for question that in a jury case a trial and decision by a judge without the written waiver of a jury trial prescribed by statute is no more than the decision of an arbitrator, and cannot be reviewed on appeal.* Campbell v. United States, 224 U. S. 99, 32 S. Ct. 398, 56 L. Ed. 684." (Italics ours.)

In the case of *Twist v. Prairie Oil & Gas Co.,* 6 Fed. (2d) 347, at page 350 the court says:

> "Considering these cases in that manner, viz., as civil cases at law tried to the court without a waiver of jury as provided by law, it is clear that this court *has no jurisdiction* to review any question except those which arise on the *process, pleadings, or judgments.*" (Italics ours.)

**(1) Unless It Affirmatively Appears From the Record That a Written Stipulation, Signed by the Respective Counsel Waiving a Jury, Was Filed With the Clerk of the District Court as Required by Rev. Stat., Sections 649 and 700, the Circuit Court of Appeals Is Without Jurisdiction to Review Alleged Errors in Rulings of the District Court, at the Trial of an Action at Law, and the Facts Found by the District Court Cannot Be Noticed by the Circuit Court of Appeals for Any Purpose.**

In the case of *Duncan v. Atchison T. & S. F. R. Co.*, 72 Fed. 808 (*Circuit Court of Appeals, 9th Circuit*), this court says at page 810:

> "No alleged error concerning the rulings of the circuit court at the trial of a cause by the court without a jury can be examined in the Circuit Court of Appeals, *unless it affirmatively appears from the record that there was a written stipulation, signed by the respective counsel, waiving a jury, as required by the statutes of the United States.* In Bond v. Dustin, 112 U. S. 604, 5 Sup. Ct. 296, the court said: * * * Since the passage of this statute, it is equally well settled, by a series of decisions, that this court cannot consider the correctness of rulings at the trial of an action by the circuit court without a jury, *unless the record shows such a waiver of a jury as the statute requires, by stipulation in writing, signed by the parties or their attorneys, and filed with the clerk.* Flanders v. Tweed, 9 Wall 425; Kearney v. Case, 12 Wall 275; Gilman v. Telegraph Co., 91 U. S. 603, 614; Madison Co. v. Warren, 106 U. S. 622, 2 Sup. Ct. 86; Alexander Co. v. Kimball, 106 U. S. 623, note, 2 Sup. Ct. 86.'

In Rush v. Newman, 7 C. C. A. 136, 58 Fed. 158, 160, the Circuit Court of Appeals said:

'There is in the record what purports to be a special finding of the facts by the court. *But the record does not show that the parties, or their attorneys of record, filed with the clerk a stipulation in writing waiving a jury,* as required by section 649 of the Revised Statutes of the United States.' *The recital in the record that 'both parties in open court, having waived a jury, and agreed to trial before the court', does not show a compliance with section 649.* The following recitals in the record have been held insufficient for this purpose: 'The issue joined by consent is tried by the court, *a jury being waived'*, and 'the above cause coming on for trial, by agreement of parties, by the court, without the intervention of a jury', and 'the parties having stipulated to submit the case for trial by the court without the intervention of a jury', and 'said cause being tried by the court without a jury, by agreement of parties' and 'upon the trial of this cause before the Hon. S. H. Treat, sitting as circuit judge, *a jury being waived by both parties'*. * * * The sufficiency of the facts found by the lower court to support the judgment can only be considered by this court when a jury has been waived in writing, as provided in section 649. *When a jury has not been thus waived, the facts found by the lower court cannot be noticed by the appellate court for any purpose, and the case stands as though the judgment of the lower court had been rendered on the general verdict of a jury.'*

See, also, to the same effect, Investment Co. v. Hughes, 124 U. S. 157, 160, 8 Sup. Ct. 377, Spalding v. Mahasse, 131 U. S. 65, 9 Sup. Ct. 649; Merrill v. Floyd, 3 C. C. A. 494, 53 Fed. 172; Branch

v. Lumber Manuf'g Co., 4 C. C. A. 52, 53 Fed. 849; Bowden v. Burnham, 8 C. C. A. 248, 59 Fed. 753; Cudahy Packing Co. v. Sioux Nat. Bank, 16 C. C. A. 409, 69 Fed. 782.

From these decisions it necessarily follows that the findings of the circuit court, based upon the evidence in the case, cannot be reviewed by this court." (Italics ours.)

In the case of *City of Cleveland v. Walsh Construction Co.*, 279 Fed. 57, at page 61, the court says:

"As affecting the action of the trial court only, it is immaterial whether the waiver be written or oral, and whether it be express or implied; *but only when it affirmatively appears by the record that the waiver was written can there be the full review which is contemplated by section 700, and which is analogous to that following upon a jury trial.*" (Italics ours.)

**(2) The Circuit Court of Appeals Is Bound of Its Own Motion, Independent of Objection by Either Party, to Decline to Act Unless It Affirmatively Appears From the Record That It Has Jurisdiction.**

In the following cases the record failed to disclose that the parties had complied with the requirements of sections 649 and 700 Rev. Stat. by filing with the Clerk of the District Court a written stipulation, signed by the parties, waiving a jury trial, and the Circuit Court of Appeals in each case held it was without jurisdiction to review errors occurring at the trial.

In the case of *Ladd & Tilton Bank v. Lewis A. Hicks Co.*, 218 Fed. 310, cited *supra*, this court held that it was

without jurisdiction upon a writ of error to review errors occurring at the trial before the District Court and that it was limited in its examination to the process, pleadings and judgment. This court, speaking through Judge Van Fleet, says at page 311:

> "Nor is the objection, as urged, in any proper sense, technical, or one which the defendant in error is estopped, by its consent in the court below, from raising. *It is one which goes to the question of the court's power in the premises, and which it would be bound to regard independently of objection by a party.* Bond v. Dustin, 112 U. S. 604, 605, 5 Sup. Ct. 296, 28 L. Ed. 835." (Italics ours.)

In the case of *St. Louis S. W. Ry. Co. v. Com'rs of Road Imp. Dist. No. 2,* 265 Fed. 524, *cited supra,* the court say at page 528:

> "The cases cited by plaintiffs' counsel are not in point. The suit being in the federal court at law to recover a sum of money, each party in that court was entitled to a jury, unless waived in the manner provided by the federal law. *A question of jurisdiction is therefore presented, which it is our duty to notice, whether assigned as error or not."* (Italics ours.)

In the case of *La Belle Box Co. v. Stricklin,* 218 Fed. 529 at page 532 the court says:

> "No question of *jurisdiction* was ever suggested to the court below or *to this court,* but *we are bound* not to overlook any *jurisdictional defect* that the record may disclose. See cases cited in our opinion this day filed in R. R. v. Stephens, 218 Fed. 535, 134 C. C. A. 263." (Italics Ours.)

In the case of *Empire City Fire Ins. Co. v. American Cent. Ins. Co.,* 218 Fed. 774, at page 776 the court says:

> "We are not satisfied that the court was mistaken in dismissing the bill for the reasons thus stated, and we shall confine ourselves to the *question* of *jurisdiction—which, of course, we are bound to consider, even on our own motion.*" (Italics ours.)

In the case of *Garvin v. Kogler,* 272 Fed. 442 at page 443, the court says:

> *"It is equally fundamental that a federal appellate court will of its own motion deny its jurisdiction,* and that of the court from which the record comes, *unless jurisdiction affirmatively appears, although neither party raise the point in the argument.* King Iron Bridge & Mfg. Co. v. Otoe County, 120 U. S. 225, 7 Sup. Ct. 552, 30 L. Ed. 623; 1 U. S. Comp. St. 751, 755." (Italics ours.)

**(3) A Recital in the Record That a Jury Was "Expressly Waived by the Parties" Does Not Show That a Written Stipulation Waiving a Jury Trial Was Filed as Required by Rev. Stat. Sections 649 and 700 Sufficient to Confer Upon the Circuit Court of Appeals Jurisdiction to Review the Sufficiency of the Evidence to Support the Judgment of the District Court.**

In the case of *Rush v. Newman,* 58 Fed. 158, at page 160 the court says:

> "There is in the record what purports to be a special finding of facts by the court. But the record does not show that the parties, or their attorneys of record, filed with the clerk a stipulation in writing waiving a jury, as required by section 649 of the

Revised Statutes of the United States. *The recital in the record that 'both parties in open court having waived a jury, and agreed to trial before the court,' does not show a compliance with section 649.* The following recitals in the record have been held insufficient for this purpose: 'The issue joined, by consent, is tried by the court, a jury being waived:' and 'the above cause coming on for trial, by agreement of parties, by the court, without the intervention of a jury:' and 'the parties having stipulated to submit the case for trial by the court without the intervention of a jury:' and 'said cause being tried by the court without a jury, by agreement of parties:' and *'upon the trial of this cause before the Hon. S. H. Treat, sitting as circuit judge, a jury being waived by both parties';*—Bond v. Dustin, 112 U. S. 604, 608, 5 Sup. Ct. Rep. 296; and 'jury waived tentatively', and 'finding of facts and verdict,'—Merrill v. Floyd, 2 C. C. A. 58, 50 Fed. Rep. 849. In the absence of a statute authorizing it, the finding of issues of fact by the court is not a judicial act of which this court can take any notice. Campbell v. Boyreau, 21 How. 223; Rogers v. U. S. 141 U. S. 548, 12 Sup. Ct. Rep. 91; Merrill v. Floyd, 2 C. C. A. 58, 50 Fed. Rep. 849. *The sufficiency of the facts found by the lower court to support the judgment can only be considered by this court when a jury has been waived in writing, as provided in section 649. When a jury has not been thus waived, the facts found by the lower court cannot be noticed by the appellate court for any purpose,* and the case stands as though the judgment of the lower court had been rendered on the general verdict of a jury; and the only question this court can consider is the sufficiency of the declaration to support the judgment. Flanders v. Tweed, 9 Wall. 425; Kearney v. Case,

12 Wall. 275; Alexander Co. v. Kimball, 106 U. S. 623, 2 Sup. Ct. Rep. 86; Bond v. Dustin, 112 U. S. 604, 5 Sup. Ct. Rep. 296; Campbell v. Boyreau, 21 How. 223; Merrill v. Gloyd, 2 C. C. A. 58, 50 Fed. Rep. 849." (Italics ours.)

## ARGUMENT.

The foregoing authorities are absolutely in point with the case at bar. *There was no written stipulation signed by the parties, waiving a jury trial, filed with the clerk of the District Court.* Even though such a stipulation had been filed with the clerk of the District Court, it would have been necessary in order to confer upon this court jurisdiction to review the sufficiency of the evidence to support the judgment, or to review errors of law occurring at the trial, that the record show affirmatively the making and filing of such stipulation with the clerk of the District Court. The only reference in the record to any waiver of a jury trial appears in the recital in the Findings of Fact and Conclusions of Law and Judgment, which is almost identical with a recital mentioned in the case of *Rush v. Newman* (*cited supra*). The recital in the case at bar is as follows:

"This cause came on regularly for trial in the above entitled court on October 15, 1925, before the Hon. Edward J. Henning, judge of said court, sitting without a jury, a jury having been expressly waived by the parties." [Tr. pp. 22, 27.]

This recital, in view of the authorities above cited, does not show a sufficient compliance with sections 649 and 700 of the Rev. Stat. to confer jurisdiction on this court to review errors, other than those arising on the process,

pleadings or judgment. Therefore, since this court found that the sole issue upon this writ of error was as to the authority of one S. Reid Holland to execute the contract on behalf of and as agent for the plaintiff in error (page 2 of the opinion), this court acted without jurisdiction in reviewing the findings of the District Court on this question, and in reversing the judgment of the District Court on the ground that the evidence before the District Court did not show that S. Reid Holland had such authority.

Wherefore, petitioner respectfully urges that a re-hearing may be granted, that the judgment of the District Court be affirmed, and that the mandate of this court may be stayed pending the disposition of this petition.

Respectfully submitted,

HERCULES GASOLINE COMPANY
*By Its Attorneys*
McCOMB & HALL,
MARSHALL F. McCOMB,
JOHN M. HALL.

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I, Marshall F. McComb of Los Angeles, California, an attorney regularly admitted to practice in the United States Circuit Court of Appeals for the Ninth Circuit do certify that in my opinion the foregoing petition for re-hearing in the case of Graver Corporation, a corporation, v. Hercules Gasoline Company, a corporation, No. 4859, is well founded and is not presented for the purpose of creating a delay.

Dated: November 8, 1926.

MARSHALL F. McCOMB.